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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 242

JESSE H. DENTON, PETITIONER,

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY, AND JIM HUNTER, COLORED, RESPONDENTS.

BRIEF OF PETITIONER.

JOHN P. BRAMHALL,
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J. V. GIPSON,
JAMES E. McCABE,
Of Counsel.

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The above entitled cause is now before this Honorable Court on writ of certiorari granted October 19th, 1931.

BRIEF OF PETITIONER.

Statement of Case.

This case grew out of an injury sustained by petitioner on April 21, 1927 (R., p. 36), while engaged in his duties as a United States Railway mail clerk

in a railway postal car which was standing in the passenger station of the respondent, the Yazoo & Mississippi Valley Railroad Company, at Jackson, Mississippi. The Illinois Central Railroad Company, also respondent herein, owned and controlled by the Yazoo & Mississippi Valley Railroad Company (R., p. 32) and maintained for their joint use the terminal passenger station at Jackson, Mississippi (R., p. 32), where large quantities of United States mail was transferred to and from respondent's lines of railway (R., p. 35) and furnished porters to transfer mail to and from the postal cars on the Yazoo & Mississippi Valley Railroad Company, at Jackson, Mississippi (R., p. 33).

Another respondent herein, Jim Hunter, a porter, whose negligence it is charged caused the injury to petitioner, was hired and paid by the respondent herein, the Illinois Central Railroad Company, who had the exclusive right to discharge him (R., pp. 20-21).

Action was commenced herein on October 22, 1929, in the Circuit Court of Lauderdale County, Mississippi, against all of the respondents (defendants below), the petitioner alleging that respondent railroad companies (R., pp. 1-6) were engaged in the transportation of United States mail and employed in pursuance thereto, porters to load, unload, and transfer such mail, and that respondent, Jim Hunter, was employed as a porter at their terminal station at Jackson, Mississippi, and while so employed, negligently (R., pp. 2-4) threw a pouch of mail into the aisle of a

postal car causing the injury complained of by petitioner (R., p. 39).

This action was commenced at the direction of the United States Employees' Compensation Commission under Section 26, of the United States Employees' Compensation Act approved September 7, 1916 (R., p. 18), to recover damages on account of an injury sustained by a Federal employee while engaged in the United States Railway mail service (R., p. 117).

The respondents each filed pleas to petitioner's declaration in the trial court, and the respondent railroad companies set up among their numerous defenses, Section 1293, paragraph (2) of the United States Postal Laws & Regulations of 1924 (R., p. 14), which is in words and figures as follows:

> "Railroad companies shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post-office cars, and to load and pile the mails in and unload them from storage and baggage cars, under the direction of the transfer clerk or clerk in charge of the car if one is on duty, * * *"

and these regulations were admitted in evidence at the instance of the respondent railroad companies (R., p. 166).

On June 18, 1930, this case was submitted to a jury on the issue joined and the respondent railroad companies were given an instruction embracing (R., p. 198) Section 1293, paragraph (2), of the United States Postal Laws and Regulations of 1924 (supra), and the

jury returned a verdict in behalf of the petitioner (plaintiff below) in the sum of $12,000.00 (R., p. 204).

On June 19, 1930, motion of respondents to set aside the verdict and judgment rendered against them on June 18, 1930, was overruled, to which action and judgment of the court the defendants excepted (R., p. 208).

On August 19, 1930, the respondents, by proper application, appealed from the judgment of the trial court (R., pp. 208-209) to the Supreme Court of Mississippi (R., pp. 208-209).

On August 27, 1930, respondent Jim Hunter, as principal, executed an appeal bond in the sum of $400.00, obligating himself and his guarantors to satisfy costs of appeal only (R., p. 209).

On August 27, 1930, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company, principals, executed an appeal bond in the sum of $24,000, wherein they and their guarantors obligated themselves to pay and satisfy the judgment complained of and all costs of appeal in case the judgment below was affirmed (R., p. 209).

On April 13, 1931, the Supreme Court of the State of Mississippi entered a judgment (R., pp. 224-225) reversing the judgment of the trial court in the above-entitled cause as to the respondents, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company, and affirmed the judgment of the trial court as to Jim Hunter (Opinion cited, 133 Southern Reps. 656, April 13, 1931), the court holding, "That the status of the porter, Hunter, at the time of his alleged negligent act while loading

mail into the post-office car was not that of a servant of the appellant railroad companies, is determined by the fact that he was at the time engaged in the business of the government, under the expressly reserved right of the government employees on the car to supervise and control him doing the work'' (R., p. 224).

On April 25, 1931, petitioner filed suggestion of errors and motion for rehearing (R., pp. 225-226).

On May 4, 1931, the Supreme Court of Mississippi overruled petitioner's suggestion of errors and motion for rehearing (R., p. 227).

Question Presented.

(1) Whether Jim Hunter, the porter, was an employee of the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company, or of the United States Government at the time petitioner, Denton, received his injuries.

Supplemental Questions.

(*a*) Was the work performed by Jim Hunter as a porter while handling United States mail a part of the services required of the respondent railroad companies in the transportation of United States mail?

(*b*) Whether the provisions of Section 1293, paragraph (2), of the United States Postal Laws & Regulations of 1924 changed the status of porters furnished by railroads as a part of their contract with the government for the transportation and handling of United States mail so that such porters while loading,

unloading and transferring United States mail became employees of the United States Government, thus and thereby relieving the railroads from liability for injuries sustained by railway postal clerks while engaged in the performance of their duties in railway postal cars on account of the negligent acts of such porters.

Specifications of Error.

(1) The court below erred in holding that Jim Hunter, a porter in the service of the respondent railroad companies, was at the time petitioner Denton received his injuries, a servant of the United States Government.

(2) The court below erred in holding that the language used in Section 1293, paragraph (2), of the United States Postal Laws & Regulations of 1924 changed the status of Jim Hunter, the porter, from that of a servant of the respondent railroad companies to that of a servant of the United States Government.

(3) The court below erred in reversing the judgment of the trial court as to the respondents, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company.

ARGUMENT.

Points and Authorities.

(1) Whose servant was Jim Hunter, the porter, at the time petitioner Denton received his injuries?

Jim Hunter was hired and paid by the Illinois Central Railroad Company (R., p. 33) and by a joint

arrangement (R., p. 32) he performed work for both respondent railroad companies as a porter handling baggage, taking care of switches, and handling United States mail (R., p. 29).

It is the contention of the petitioner that the work performed by Jim Hunter, as a porter, while loading (handling) United States mail was a part of the service required of the respondent railroad companies in the transportation and handling of United States mail and that respondents were paid for that service by the United States Government as will be disclosed by the following provisions of the United States Statutes:

> **"39 U. S. C. A., 531. Rates of Payment for classes of routes. The rates of payment for the services authorized in accordance with this section shall be as follows, namely:**
>
> (*a*) Full railway post-office car service. For full railway post-office car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.
>
> In addition thereto he may allow not exceeding $4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.
>
> (*b*) Apartment railway post-office car service. For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.
>
> In addition thereto he may allow not exceeding $2.75 as a combined initial and terminal rate for each one-way trip of a thirty-foot apartment car and $2 as a combined initial and term-

inal rate for each one-way trip of a fifteen-foot apartment car.

(*c*) Storage-car service. For storage-car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding $4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

(*d*) Closed-pouch service. For closed-pouch service, at not exceeding 1½ cents for each mile of service when a three-foot unit is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized.

In addition thereto he may allow not exceeding 25 cents as the combined initial and terminal rate for each one-way trip of a three-foot unit of service and 50 cents as a combined initial and terminal rate for each one-way trip of a seven-foot unit of service. (July 28, 1916, c. 261, Sec. 5, Subd. 8 (*a, b, c, e*), 39 Stat. 426)":

"**39 U. S. C. A., 533. Initial and terminal rates to cover certain expenses; varying allowances for full railway post-office cars, apartment railway post-office cars, and storage cars.** The initial and terminal rates provided for in section 531 of this title shall cover expenses of loading and unloading mails, switching, lighting, heating, cleaning mail cars, and all other expenses incidental to station service and required by the Postmaster General in connection with the mails that are not included in the car-mile rate. The allowance for full railway post-office cars, apartment railway post-office cars, and storage cars may be varied in accordance with the approximate difference in their respective cost of con-

struction and maintenance. (July 28, 1916, c. 261, Sec. 5, Subd. 8 (*g*), 39 Stat. 426)".

It will be noted that the initial and terminal rates provided for in Section 531 of this title (*supra*), shall cover expense of loading and unloading mail and establishes beyond controversy that the respondent railroads were paid for the service rendered by Jim Hunter, the porter, while loading and unloading mail at their terminal station at Jackson, Mississippi, and was performing the work of the respondent railroad companies for which he was employed by them to do, at the time said porter inflicted upon petitioner the injuries complained of.

The initial and terminal rates provided for in Section 531 (*supra*) as a remuneration to railroads for loading and unloading United States mail was merged with and added to the line rates provided for in said Section 531, on December 23, 1919. (See 56 I. C. C. Rep. 1.)

39 U. S. C. A., Section 538 (Sec. 5, Subd. 13, 39 Stat. 427), provides as follows:

> **Facilities for Carrying and Handling Mails.**—"Railroad companies carrying the mail shall furnish all necessary facilities for caring for and handling them while in their custody, etc."

39 U. S. C. A., Section 541 (Sec. 5, subd. 27, 39 Stat. 429), provides as follows:

> **Transportation Required in Manner, Under Conditions, and with Service Prescribed by Postmaster General; Compensation therefor.**—All railway common carriers are hereby required

> to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

39 U. S. C. A., Section 538, provides without equivocation that railroad companies shall furnish all necessary facilities for caring for and handling mail while in their custody, and the services of the porters employed by the railroads for transferring United States mail, as in the instant case, is merely the performance of a part of the duties which are required from railroads by the Federal statutes incident to the transportation of mail.

39 U. S. C. A., Section 541 (Sec. 5, subd. 27, 39 Stat. 429), provides that all railway common carriers are required to transport such mail as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

The foregoing Federal statutes make it mandatory upon every common carrier to transport United States mail, and it also provides that they shall receive a fair compensation for such transportation and for the service connected therewith. What service, may we ask? The service rendered in transferring mail by porters at railway transfer points, which

necessarily must include the loading and unloading of mail by such porters.

These two provisions alone, if no other authority was cited, is compelling, that the work of porters furnished by the railroads in handling United States mail at transfer points is a part of the work incumbent upon the railroads to be performed by them, for which they are paid a fair and reasonable compensation as a service connected with the transportation of United States mail.

The loaned servant doctrine can have no application to the case at bar because Jim Hunter, the porter, was the admitted servant of the respondent railroad companies and was doing the very work he was employed by them to do, and for which they were paid by the United States Government. It was the sole duty and obligation of the respondent railroad companies to load and unload the United States mail. It was none other than the work of the railroads that was being performed by the porter at the time petitioner was injured. It was a part of the business of the railroads as shown by the Federal Statute cited herein to not only transport the mail but to load and unload it at such places and under such conditions as prescribed by the Postmaster General.

The following United States statute provides who shall become employees of the Post Office Department:

> "**5 U. S. C. A., 365. Oath of Office.**—Before entering upon the duties, and before they shall receive any salary, the Postmaster General, and all persons employed in the postal service, shall respectively take and subscribe before some

> magistrate or other competent officer authorized to administer oaths by the laws of the United States, or of any State or Territory, the following oath or affirmation, etc."

The foregoing provisions prescribe the manner in which individuals may enter the postal service and this provision is mandatory. The government unlike individual employers provides by statute whom it shall employ and take into its service and confidence and only by such statute can persons enter the service of the United States Government.

It is not contended that Jim Hunter, the porter, whose negligence caused the damage complained of, was ever inducted into the service of the United States Government in the manner and form required by law.

5 U. S. C. A., Sec. 22, provides as follows:

> **Departmental Regulations.**—The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and the preservation of the records, papers and property appertaining to it (R. S. Sec. 161).

This statute has authorized the heads of the executive departments of the United States Government to make regulations for their respective departments and, pursuant thereto, the Post Office Department promulgated, on July 1, 1924, the following postal laws and regulations respecting the transportation and handling of United States mail, viz:

SECTION 1286, Par. 5.—Any person acting for an advantage to himself or another, by authority or consent of the railroad company, and representing in any manner the interests of the company or railroad in its business transactions with the public, will be regarded as the company's agent or representative.

SECTION 1288.—At places where railroad companies are required to take the mails from and deliver them into post offices or postal stations or to transfer them to connecting railroads the persons employed to perform such service are agents of the companies and not employees of the postal service, and need not be sworn; but such persons shall be more than 16 years of age and of suitable intelligence and character. Postmasters shall promptly report any violations of this requirement to the superintendent of the Railway Mail Service.

SECTION 1293, Par. (2).—Railroad companies shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post-office cars, and to load and pile the mails in and unload them from storage and baggage cars, under the direction of the transfer clerk or clerk in charge of the car if one is on duty, etc.

The three preceding sections of the Postal Regulations are based upon 39 U. S. C. A. 538 (Sec. 5, subd. 13, 39 Stat. 427), and were promulgated for the purpose of carrying into effect the provisions of that statute.

Force and Effect of Regulations as Law.

A regulation of a department, in conformity to a particular Act of Congress, becomes a part of the law and is of as binding force as if incorporated in the body of the law itself. Caha *v.* U. S. (Kan. 1894), 14 S. Ct. Rep. 513, 152 U. S. 221; 38 L. Ed. 415; *Ex Parte* Reed (1879), 100 U. S. 13, 25 L. Ed. 538; Wilkins *v.* U. S., 175 U. S. 727, 44 L. Ed. 339.

Judicial Notice of Regulations.

The courts take judicial notice of the regulations of executive departments. *Ex parte* Reed (1879), 100 U. S. 13, 25 L. Ed. 538; Wilkins *v.* U. S., 175 U. S. 727, 44 L. Ed. 339.

Acquiescence in Postal Regulations.

Section 1288 (*supra*) of the United States Postal Laws and Regulations of 1924 have been in effect since July 1, 1924, and it has been held that where for a long time a railroad company acquiesced in a postal regulation applicable to contracts and statutes relating to the carrying of mails, such acquiescence will not be disregarded without most persuasive reasons. Great Northern R. Co. *v.* U. S. (Minn. 1916), 236 Fed. 433, 149 C. C. A. 485.

Conclusion.

The Supreme Court of Mississippi in rendering its opinion in the case at bar (R., pp. 216-224) cited Standard Oil Co. *v.* Anderson (212 U. S. 215, 53 L. Ed. 485), as authority for reversing the judgment of

the trial court as to respondents, the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company.

Petitioner contends that the opinion of the Supreme Court of Mississippi in this case (133 S. Rep. 656) is not only in direct conflict, both in letter and spirit, with the opinion of this Honorable Court in Standard Oil Co. *v.* Anderson, *supra,* but is out of harmony with the settled opinions of both the Federal and the State courts on the question involved herein.

It is undisputed that Jim Hunter, the porter, was in the general employment of respondent railroad companies (defendants in the trial court), who selected him, paid him his wages (R., pp. 20-21), and had the right to discharge him for incompetency, misconduct, or for any other reason.

Section 1293, paragraph (2), of the United States Postal Laws and Regulations of 1924 provides that the railroads shall furnish porters for transferring mails, meaning thereby that railroad companies were to furnish the work or human effort that was necessary for the transfer of the mail.

It is true, the porters were required to work under the direction of certain postal employees, they having authority to suggest and point out to such porters the mails to be transferred and the cars into which it was to be loaded or from which it was to be unloaded, but this is not sufficient to suspend the relation of master and servant as between Jim Hunter, the porter, and respondent railroad companies, thereby making him a servant of the United States Government for a few

fleeting moments, during which time petitioner suffered the injuries complained of.

The collection and distribution of United States mail is a stupendous task undertaken by different persons doing different parts of the same undertaking. There must be co-operation and co-ordination or there would be chaos, and there must be somebody to point out, or indicate, the routing and disposition of the United States mails at railroad terminals and transfer points and this particular part of this vast undertaking has been delegated by the Postmaster General to the postal employees because of their knowledge and ability to determine the disposition of the mail handled by the railroad employees.

The word "direction" as used in Section 1293, Par. (2), of the United States Postal Laws and Regulations of 1924, could mean no more than TO POINT OUT, TO SHOW, or INDICATE to the porters employed by the railroads for loading and unloading United States mail, the disposition to be made of the various pouches or sacks of mails at railroad terminals and transfer points where the services of porters are required under the postal regulations.

Code Civ. Proc., 1022, provides that the report of a referee must direct the judgment to be entered thereon. Held, that the word "direct," as used in this connection, is synonymous with the words "to point out; to guide; to show; to regulate." Webst. Internat. Dict. And hence it cannot be held that the Legislature thereby intended that the referee should formulate the judgment, and that the only require-

ment was that the report should be sufficiently full to show the particular form and terms of the judgment to which the successful party was entitled thereunder. Hinds *v.* Kellogg, 13 N. Y. Supp. 922, 923.

Quoting from the opinion of the Supreme Court of the United States in Standard Oil Co. *v.* Anderson (*supra*), it was said:

> "When one large general work is undertaken by different persons, doing different parts of the same undertaking, there must be co-operation and co-ordination or there will be chaos. The giving of signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of master."

In Standard Oil Company *v.* Anderson, 212 U. S. 215, 226, the court quoted at length from Driscoll *v.* Towle, 181 Mass. 416, 63 N. E. 922. The opinion in the Driscoll case was delivered by Chief Justice Holmes, now Mr. Justice Holmes, and we quote the following from this opinion:

> "But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant; more than that is necessary to take him out of the relation established by the only contract which he has made, and to make him a voluntary subject of a new sovereign—as the master sometimes was called in the old books."

The opinion of this Honorable Court in Standard Oil Company *v.* Anderson, *supra,* and the opinion delivered by Chief Justice Holmes in Driscoll *v.* Towle, *supra,* are decisive on the question of master and servant involved in this case.

We therefore respectfully submit that the Supreme Court of the State of Mississippi in the above-entitled cause was in error, and that its decision should be reversed and the original judgment entered by the trial court reinstated.

Respectfully submitted,

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